No. 89-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF AMICI CURIAE CBS INC., CAPITAL CITIES/ABC, INC., DOW JONES & COMPANY, INC., THE HEARST CORPORATION, KNIGHT-RIDDER, INC., NATIONAL BROADCASTING COMPANY, INC., REUTERS INFORMATION SERVICES INC., THE TIME INC. MAGAZINE COMPANY, TRIBUNE COMPANY, UNITED PRESS INTERNATIONAL, INC., THE WASHINGTON POST, WESTINGHOUSE BROADCASTING COMPANY, INC., THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION OF AMERICAN PUBLISHERS, MAGAZINE PUBLISHERS OF AMERICA, INC., NATIONAL ASSOCIATION OF BROADCASTERS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS, IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

This brief is submitted on behalf of nineteen amici curiae who include broadcasters, news services, publishers, and associations of working journalists and writers.* As members of the media, these amici operate under the constant threat of libel claims, almost all of which seek punitive damages. In recent years, both the frequency and amount of these awards have increased at an alarming rate.

The threat of punitive damage awards now affects the nation's media at all levels, from national news organizations to the smallest local newspapers and broadcasters, and interferes with their vital role in the reporting and discussion of public affairs. At a minimum, therefore, these amici support the due process limitations urged by the petitioner in this case.

However, these amici also believe that punitive damages awards in libel cases involving matters of public concern are irreconcilable with the requirements of the First Amendment. They therefore urge the Court to recognize that its decision in the present case may also have an impact in cases arising from discussion of public affairs, where mere limitations on punitive damage awards may not be adequate to protect First Amendment values.

SUMMARY OF ARGUMENT

The libel decisions of this Court have examined the problem of unrestrained punitive damage awards at length, and the Court has imposed constitutional limitations on the award of such damages arising from speech involving matters of public concern. These restraints, although framed under the First Amendment, are essentially due process concerns, and their reasoning has been applied by the Court in non-libel cases as well. They

* Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 36.

serve as a valuable touchstone for addressing constitutional limitations on punitive damages in general.

In any kind of case, the availability of unrestrained punitive damages encourages unnecessary lititation, permits arbitrary punishment of unpopular defendants, and often deters conduct that is lawful, socially beneficial, and even constitutionally protected. When balanced against the ineffectiveness of such awards in serving even their own theoretical purposes, the harm caused by the threat of punitive damages far outweighs any arguable benefit.

Such an arbitrary system of punishment offends fundamental principles of due process. When it is employed by juries to punish unpopular speech and speakers, it violates the First Amendment as well. The First Amendment requires that any form of government action that threatens to punish or suppress speech must meet the highest standards of due process. The unrestrained award of punitive damages fails to satisfy even the minimum standards required by the Fourteenth Amendment and is inherently inconsistent with the requirements of the First Amendment.

ARGUMENT

I. THE EXPERIENCE OF MEDIA DEFENDANTS IN LIBEL CASES HIGHLIGHTS THE DANGERS OF UNRESTRAINED PUNITIVE DAMAGE AWARDS.

A. Punitive Damage Awards in Libel Cases Have Increased Despite Constitutional Limits Imposed by the Court.

Well before the recent challenges to punitive damages on Eighth and Fourteenth Amendment grounds,[1] this Court recognized the danger posed by punitive damages under the First Amendment. In fact, the problem of unrestrained damage awards has been a constant theme in

[1] *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

this Court's efforts to reconcile the common law of libel with competing First Amendment limitations.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964), the Court recognized that the threat of unrestrained punitive damages raises severe constitutional problems as "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance on the criminal law." (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).[2]

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and again in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the discussion of punitive damage awards occupied much of the Court's attention. Justice Harlan, originally supporting punitive damages in *Butts*, expressly retreated from that position in *Rosenbloom* and concluded:

> I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.

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[2] The Court observed:

> A person charged with violation of this [criminal libel] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action . . . . And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded . . . for the same publications.

376 U.S. at 277; *see also Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("although punitive damages are 'quasi-criminal,' . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings"); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 152-53 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 322-33 (1983) (suggesting application of Fourth, Fifth and Sixth Amendments to punitive damages proceedings).

403 U.S. at 77 (Harlan, J., dissenting). In a separate opinion, Justices Marshall and Stewart concluded that punitive damages should be prohibited altogether in such cases.[3] These dissenting opinions became the foundation for the majority opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the Court concluded:

> [P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries . . . .

Id. at 350.[4]

Most recently, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), four members of the Court joined in an opinion reasserting the objections to punitive awards discussed in *Rosenbloom* and *Gertz*, stressing the "largely uncontrolled discretion" of juries to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused" as a rationale for the limitations imposed in *Gertz*. *Id.*

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[3] 403 U.S. at 82-83 (Marshall, J., dissenting):

> [Punitive damages] serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but can be awarded in almost any amount. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on the jury in awarding punitive damages is that the damages not be "excessive," and in some jurisdictions that they bear some relationship to the amount of compensatory damages awarded. [Citation omitted.] The manner in which unlimited discretion may be exercised is plainly unpredictable.

[4] *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 779 (1985) (Brennan, J., dissenting) ("Justice Harlan's perception formed the cornerstone of the Court's analysis in Gertz.").

at 778 (Brennan, J., dissenting) (quoting *Gertz*, 418 U.S. at 350).

Each of these cases, including *Dun & Bradstreet*, affirmed the need for constitutional limits on the availability of libel damages to protect discussion of public affairs, with the Court in *Gertz* holding simply:

> [T]hat the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

418 U.S. at 349.

Despite these stated concerns and limitations, both the amount and frequency of punitive damage awards against the media in libel cases have continued to rise. During the 1980's multi-million dollar verdicts against libel defendants became almost commonplace.[5] Many awards were overturned or reduced on appeal; many were questioned on constitutional grounds by courts and commentators alike;[6] but these facts are cold comfort to the pub-

[5] One study reported that, between 1980 and 1984, approximately 60% of libel verdicts against media defendants included an award of punitive damages (compared to less than 10% for non-libel cases involving money damages). The average punitive award was reported as substantially in excess of $2,500,000, and punitive damages accounted for approximately 80% of the total amount of damages awarded. *See* Libel Defense Resource Center, *Recent Trends in Libel Damage Awards Against the Media*, Libel Defense Resource Center Bulletin No. 18 at 58-63 (December 15, 1986). *See also*, Libel Defense Resource Center Bulletin No. 21 (October 31, 1989); Libel Defense Resource Center Bulletin No. 11 (November 14, 1984); Franklin, *Suing Media for Libel; A Litigation Study*, 1981 A.B.A. Res. J. 795, 829; Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Record of Assoc. of Bar of City of New York 20, 39-40 (Jan./Feb. 1987).

[6] *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 793-94 (1985) (Brennan, J. dissenting); *see also Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979); *Stone*

lishers and broadcasters who may be forced to meet prohibitive bond requirements and to endure expensive appeals before constitutional safeguards are properly applied.[7]

The trend toward ever-higher and increasingly irrational punitive awards continues. In *Sprague v. The Philadelphia Inquirer*, New York Times, May 3, 1990 at 1, col. 2 (Pa. Ct. Com. Pl., May 3, 1990), a jury awarded $31.5 million in punitive damages against the Philadelphia Inquirer in a libel action. This was the second time the case was sent to a jury. On the first occasion, a different jury imposed a punitive award of "only" $4 million (a difference of $27.5 million) on the same set of facts. The challenged articles concerned the plaintiff's investigation of a homicide in his capacity as chief of homicide for the Philadelphia District Attorney's office. Similarly, in *Srivastava v. Harte Hanks Communications, Inc.*, Communications Daily, May 7, 1990 (Tex. Ct. Com. Pl., formal judgment pending), a jury awarded the plaintiff $17.5 million in punitive damages in a libel action against a local television station. In *George v. International Society for Krishna Conscious-*

v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975); *Taskett v. King Broadcasting Co.*, 86 Wash.2d 439, 546 P.2d 81 (1976); *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674, *cert. denied*, 423 U.S. 991 (1975); *see also* Wheeler, *supra* note 2; Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847 (1985).

[7] This fact was shown dramatically in the case of the *Alton Telegraph*, a small Illinois newspaper, which suffered a $9.2 million libel verdict, including $2.5 million punitive damages. The company, valued at only $3 million ultimately settled for $1.4 million after it was unable to raise the bond required for an appeal on the merits. *See* Curley, "'Chilling Effect' How Libel Suit Sapped the Crusading Spirit of a Small Newspaper," Wall St. J., Sept. 29, 1983, at 1, col. 1. *See also*, Massing, *The Libel Chill: How Cold Is It Out There?*, Colum. Journalism Rev., at 31 (May/June, 1985); Note, *The Constitutionality of Punitive Damages in Libel Actions*, 45 Fordham L. Rev. 1382, 1384 (1977).

ness, 262 Cal. Rptr. 217 (Cal. App. 1989), a jury awarded $32 million in punitive damages for, among other things, a libel claim based on a press release. In *Newton v. National Broadcasting Co.*, 677 F. Supp. 1066 (D. Nev. 1987), currently on appeal before the Ninth Circuit, a Las Vegas jury awarded $5 million in punitive damages against NBC in a libel action brought by entertainer Wayne Newton. It appears that juries are feeling no particular restraints, constitutional or otherwise, in awarding punitive damages in libel cases.

B. Punitive Damages Have Been Arbitrarily Assessed Against Unpopular Defendants.

In theory, punitive damages are intended to punish and to deter specific conduct that society finds outrageous or reprehensible.[8] In practice, however, juries often use this uncontrolled weapon to punish defendants not for what they have done, but for who they are. It is no mere coincidence that defendants such as *Hustler* and *Penthouse* magazines have suffered punitive damage verdicts in the eight-figure range more than once.[9]

Far more troubling is the number of these megaverdicts that are being imposed in cases arising out of commentary on public affairs [10] and the six- and seven-figure punitive awards imposed on news media defendants almost as a matter of course, once the jury finds for the

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[8] *See* Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 849 (1985); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 282 (1983).

[9] *See, e.g., Guccione v. Hustler Magazine*, 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987) ($37,000,000); *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984), *cert denied*, 471 U.S. 1015 (1985) ($33,000,000); *Pring v. Penthouse International*, 695 F.2d 438 (10th Cir. 1982); *cert. denied*, 462 U.S. 1132 (1983) ($25,000,000).

[10] *See* notes 5-7 and accompanying text, *supra*.

plaintiff on the question of liability.[11] Professor Van Alsytyne, commenting on this disturbing pattern, observed: "[J]uries may tend to find whatever they are told is necessary for them to find if they thoroughly dislike the publisher, his publication, his general practice, or his business . . . ." Van Alstyne, *First Amendment Limitations on Recovery from the Press*, 25 Wm. & Mary L. Rev. 793, 795-96 (1984).[12]

It may be that libel juries are merely reflecting a general shift of attitude on the subject of damages—that "[j]uries in all forms of tort litigation are finding for individual plaintiffs with less attention to the arguments of corporate defendants and greater inclination to award staggering damages than ever before." Goodale, *Centuries of Libel Erased by Times v. Sullivan*, 191 N.Y.L.J. 49 (1984). The jury in the present case may have awarded punitive damages out of sympathy for the plaintiff—a sense that "someone should pay" for what she endured, regardless of the culpability of the particular defendant. This sense of frustration and anger may be a natural human reaction, but it is not a rational basis for assessing punitive damages, and unchecked, it leads to arbitrary and irrational results.[13]

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[11] *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

[12] Professor Van Alstyne also noted the possibility that attempts to restrict awards under the actual malice rule may have had the opposite impact on jurors:

> [A] juror might suppose that if recklessness must be proved and if recklessness also entitles the defendant to consideration of punitive damages, then absent some exceptional reasons, the juror ought assuredly and quite routinely award punitive damages . . . .

Van Alstyne, 25 Wm. & Mary L. Rev. at 797.

[13] *See* Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dick. L. Rev. 609, 613-15 (1989) (discussing jury verdict in *McCoy v. Hearst Corp.*, 174 Cal. App. 3d 892, 220 Cal. Rptr. 848 (1985), which awarded iden-

When the defendant's conduct toward the plaintiff does become an issue, the jury is almost always invited to "send a message" that the defendant—often a large corporation—cannot ignore. Unfortunately, there is very little guidance at that point to insure that the message is warranted by the defendant's conduct, and not merely by the jurors' distaste for the defendant's size, financial net worth, or even by regional prejudices.

As Justice Douglas reminded in his dissent in *Gertz*, the influence of emotion and prejudice is not confined to juries: "Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 359 (1974). Excessive damage awards may also reflect, in part, "localized judicial distaste for certain publishers" and judges' "understandable, but constitutionally improper, distaste for the defendant's publication." Van Alstyne, 25 Wm. & Mary L. Rev. at 801, 808.

In short, the danger of punitive damages is not merely that they are unrestrained; it is that they are, by definition, a court-sanctioned invitation to *punish* the defendant. And as long as punitive damages remain available as a weapon in civil cases, there will be the temptation to punish for the wrong reasons. Restraining the *amount* of damages or the procedures under which they are awarded will not remove the temptation. Jurors and judges alike may simply find whatever they are told they need to find to justify the result, if the desire to award damages is great enough.

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tical amounts of $1,000,000 "compensatory" and $520,000 punitive damages to each of three different plaintiffs and apportioned the awards with similar symmetry against a newspaper, its reporter, and a freelance writer). *See also* notes 5-7 and accompanying text, *supra*. In the present case, on the other hand, one respondent appears to have received the entire punitive award, while the other three were restricted to compensatory damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537, 539 (Ala. 1989).

C. The "Prize" of Unrestrained Punitive Damage Awards Has Encouraged Expensive and Unnecessary Litigation.

The prospect of virtually unlimited punitive damage awards against large corporations can and does change the character of litigation. The punitive damage lawsuit is not controlled by practical concerns of fair compensation for real loss suffered or a realistic assessment of its costs. Too often, it becomes an expensive, time-consuming, and wasteful exercise in litigation tactics—a high-stakes gamble on the jury's emotions, with a prize limited only by the defendant's net worth. And because the stakes are perceived to be so high, the defense of a punitive damages case may also take on the inflated character of a multi-million dollar dispute, whether justified or not.

This lottery mentality, especially prevalent in libel cases, can lead to protracted and expensive litigation in virtually any kind of case where the defendant's attitude, size, or wealth can be made an issue. And, as the experience with libel cases demonstrates, the promise of unrestrained awards can subvert even the most carefully-drawn system for compensating actual injury and convert it to an emotional appeal to jury passion and prejudice. The end result is an irrational system in which the costs—"the encouragement of unnecessary litigation and the chilling of desirable conduct"—far outweigh the alleged benefits of punitive damages. *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

In the area of libel law, the "desirable conduct" chilled by the prospect of punitive damages is constitutionally protected conduct—free speech on matters of public concern. The need to protect this First Amendment interest has been the driving force behind restrictions imposed by this Court in libel cases, but the Court's attention has been focused on restricting liability, not dam-

ages.[14] Although the Court's reasoning in these cases has addressed the chilling effect of unrestricted and unpredictable damage awards on First Amendment freedoms,[15] and although these arguments have been applied to restrict punitive damages in non-libel cases,[16] the Court has not yet imposed these restrictions directly on the award of libel damages. The result is a standing invitation for libel plaintiffs to navigate whatever rules and semantic hurdles may be necessary to gain the prize of unlimited punitive damages. The recent examples discussed above [17] suggest that plaintiffs and their lawyers are accepting this invitation with disturbing frequency and substantial monetary success.

II. PUNITIVE DAMAGES ARE UNNECESSARY AND INEFFECTIVE IN SERVING THEIR THEORETICAL PURPOSES.

The traditional common-law justifications offered for punitive damages are: (1) providing compensation in cases where undercompensation of harm is likely, (2)

[14] Even in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974), which purported to restrict libel damages to "compensation for actual injury," the possibility of punitive damages where actual malice could be shown was only noted in passing. There was no discussion of what further limitations might be constitutionally required in such a case. More recently, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. at 771 (White, J., concurring), Justice White criticized the Court's single-minded focus on the liability issue and suggested instead that presumed and punitive damages might have been restricted or prohibited altogether, as an alternative means of First Amendment protection.

[15] *See*, notes 2-4 and accompanying text, *supra*.

[16] *See, e.g., Electrical Workers v. Foust*, 442 U.S. 42, 48-52 (1979) (union's breach of duty of fair representation); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (municipal liability under § 1983). *See also, Dun & Bradstreet*, 472 U.S. at 780 n.4 (Brennan, J., dissenting).

[17] *See* notes 5-7 and accompanying text, *supra*.

deterrence of future undesirable conduct, and (3) punishment or retribution for past reprehensible conduct. *See* Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 850 (1985); *see also Gertz*, 418 U.S. at 849-50; *Dun & Bradstreet*, 472 U.S. at 760-61.

In the context of libel awards, the Court has recognized that, with the possible exception of purely private libel cases,[18] punitive damages do not serve "[t]he legitimate state interest underlying the law of libel [,*i.e.*,] the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz*, 418 U.S. at 341. Punitive damages "are wholly unrelated to th[is] state interest" because they "are not compensation for injury." *Id.* at 350.[19]

Even in non-speech cases, it is highly doubtful whether punitive damages serve their own declared purposes. The "undercompensation" rationale is a logical outgrowth of early common law limitations on actual damages. *See* Wheeler, *supra* note 2 at 304-05. Modern damages theories are far more expansive—courts no longer rely on restrictive definitions of "actual damages." Under relaxed standards of proof, they now allow compensation for virtually every conceivable form of injury. *See Gertz*, 418 U.S. at 350 ("actual injury is not limited to out-of-pocket loss" and "include[s] impairment of reputation and standing in the community, personal humilitation,

[18] In *Dun & Bradstreet*, 472 U.S. 749, the Court upheld an award of punitive damages in what the plurality opinion characterized as a "purely private" libel case involving no matters of public interest. However, one of the three Justices making up the plurality was Justice O'Connor, who has since declared her strong concern that the award of uncontrolled punitive damages may be unconstitutional. *See* text accompanying notes 30-31, *infra*.

[19] The related doctrine of presumed damages is also essentially punitive, inviting juries "to punish unpopular opinion rather than to compensate" and to grant "gratuitous awards of money damages far in excess of any actual injury," a result in which "the States have no substantial interest." *Id.* at 349.

and mental anguish and suffering"); *see also* Wheeler, *supra* note 2 at 305, 310. Given this expansive reading of actual damages in libel cases, the compensatory justification for punitive damages in such cases is no longer valid.

It is equally doubtful whether punitive damages are effective as a deterrent to future wrongful conduct:

> The theory of deterrence assumes that the person to be deterred rationally weighs the benefits and costs (including the possible punitive sanctions discounted by the probability of their being imposed) likely to flow from the contemplated conduct.

Id. at 306. This theoretical balancing process depends on the potential defendant's ability to accurately predict the amount and the likelihood of those costs; deterrence is effective only when costs are both certain to be imposed and optimal in amount, that is, sufficient to deter the targeted conduct without also deterring beneficial conduct. *Id.* at 306-09.

In practice, however, the imposition of punitive damages falls totally outside this theoretical framework. In a statutory scheme, legislatures at least have the opportunity to consider such questions and to attempt definitions of both conduct and punishment that will approximate these goals. In the courtroom, however, juries are invited to assess punitive damages without any consideration of, much less confinement to, the amount strictly necessary to deter *only* unprotected conduct. There is no certainty as to whether such damages will be imposed or in what amounts. This unpredictability alone undercuts the theoretical goal of deterrence.[20]

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[20] It might be argued that strict application of the standards defining such intentional torts as fraud reduces the unpredictability of punitive damage awards, but the media's experience with the carefully defined "actual malice" standard refutes this assumption. Actual malice may make liability more difficult to establish, but "courts still lack a way of judging in First Amendment terms the

Finally, especially in the libel context, punitive damages do not effectively serve the purpose of punishment or retribution. "The state has a legitimate interest in retribution only when the wrongdoer has chosen to commit a morally reprehensible act, knowing that it would likely cause harm to another individual." Note, 98 Harv. L. Rev. at 859; *see also* Wheeler, *supra* note 2 at 311. In most libel cases, punitive damages are awarded without regard to these considerations, despite use of the term actual "malice."

Even when the actual malice rule is properly applied, it does not necessarily reach the issue of whether the defendant's conduct is truly "outrageous" and prompted by the "evil motives" normally required to be shown before punitive damages may be awarded.[21] The requirement of actual malice in libel cases is a tool for defining the standard of *liability*, not the level of damages. It focuses only on the defendant's attitude toward the facts, and not on the defendant's attitude toward the plaintiff or any intent to do harm. *See, e.g., Harte Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2684-85 (1989); Note, 98 Harv. L. Rev. at 854. It is possible, therefore, to have a technical finding of "actual malice" as defined by *New York Times* where there is absolutely no evidence of "malicious" conduct in the common sense of the word. The jury may then be invited to award punitive damages without any further restrictions.

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propriety of the amount of an award, however stupendous, once the liability hurdle has been surmounted." Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dick. L. Rev. 609, 616 (1986) (footnote omitted). Once a jury finds actual malice, its discretion to award punitive damages may remain virtually unbridled. Potential defendants still may or may not face heavy damage awards depending on how the jury reacts to their choice of language.

[21] *See* Restatement (Second) Of Torts § 908(2) (1977) (imposition of punitive damages is premised on outrageous conduct arising out of the defendant's evil motives).

In summary, awards of punitive damages against speech on matters of public concern do not "further the state interest in providing remedies for defamation by ensuring that those remedies are effective." *Dun & Bradstreet*, 472 U.S. at 761. They do not effectively deter, punish, or compensate for injury from unprotected speech. Instead, these damages overcompensate plaintiffs (often dramatically) at the constitutionally impermissible expense of deterring and punishing *protected* speech.

These costs associated with punitive damages arise outside the First Amendment context as well. *See, e.g., Smith v. Wade*, 461 U.S. at 59-60 (Rehnquist, J., dissenting) ("The alleged deterrence achieved by punitive damages is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct . . . ."). As a result, the highest courts of several states have rejected punitive damages as fundamentally unsound in principle.[22]

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[22] *See Killibrew v. Abbott Laboratories*, 359 So.2d 1275 (La. 1978) ("punitive damages are not allowable unless . . . a statute expressly authorizes the imposition of such a penalty"); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1972) ("It is a fundamental rule of law in this state that punitive, vindictive or exemplary damages are not allowed. The measure of recovery in all civil cases is compensation for injury sustained."); *Vratsenes v. New Hampshire Auto, Inc.*, 112 N.H. 71, 289 A.2d 66 (1972) ("The idea [of punitive damages] is wrong. It is a monstrous heresy.'" *quoting Fay v. Parker*, 53 N.H. 342, 382 (1872)); *Maki v. Aluminum Bldg. Products*, 73 Wash.2d 23, 436 P.2d 186 (1968) ("From [1871] to the present day, this court has held that the doctrine of punitive damages is unsound in principle.").

III. THE AWARD OF PUNITIVE DAMAGES AND THE METHOD BY WHICH THEY ARE IMPOSED VIOLATES DUE PROCESS REQUIRED UNDER BOTH THE FIRST AND FOURTEENTH AMENDMENTS.

A. The First Amendment Requires the Highest Standards of Due Process Where Punishment or Suppression of Speech Is Threatened.

While the basic issue before the Court is whether unrestrained punitive damage awards violate due process requirements of the Fourteenth Amendment, much of the Court's discussion of punitive damages to date has centered on limitations mandated by the First Amendment. This fact may tempt some to dismiss the relevance of these earlier decisions by categorizing them narrowly as "free speech" cases, but on closer review it is clear that the reasoning of these cases can be asserted with equal conviction under the Due Process Clause of the Fourteenth Amendment. In fact, in summarizing the constitutional objections to punitive damages in the libel context, the dissent in *Dun & Bradstreet* was framed largely in the language of due process.[23] Further, as this Court stated in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), "freedom of speech and of the press—which are protected by the 1st Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states." *See also, Near v. Minnesota*, 283 U.S. 697, 707 (1931).

In one sense, the only difference between punitive damages in a libel action and in any other case is the fact that in the former the conduct being punished and deterred is speech. The difference, of course, is significant. The Court has long recognized that any form of state regulation that restricts free speech demands heightened

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[23] *See Dun & Bradstreet*, 472 U.S. at 778-79 (Brennan, J., dissenting); *see also*, notes 19-20 and accompanying text, *supra*.

scrutiny of due process concerns.[24] The general principle was summarized in *Speiser v. Randall*, 357 U.S. 513, 520 (1957):

> When we deal with the complex of strands in the web of freedoms which make up free speech, *the operation and effect of the method by which speech is sought to be restrained* must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

Id. at 520 (emphasis added).

This principle is reflected in various rules enunciated by the Court to ensure that any form of government restraint on speech does not reach beyond the permitted bounds to impinge on protected speech. For example:

- In all cases, the burden is on the government to establish that the restraint of speech is justified under the appropriate standard.[25]
- In cases of doubt, the balance must be struck in favor of protecting speech.[26]
- Encompassing both the prior rules, speech is presumed protected until proven otherwise with convincing clarity.[27]

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[24] *See Young v. American Mini Theatres*, 427 U.S. 50, 76 (1976) (Powell, J., concurring); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Car[illegible]e Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Lovell v. Griffin*, 303 U.S. 444 (1938). The award of libel damages is such a "form of state regulation" subject to the rule. *See, New York Times v. Sullivan*, 372 U.S. at 278.

[25] *E.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (and cases cited therein); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Speiser v. Randall*, 357 U.S. 513, 526 (1957); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-42 (1953).

[26] *E.g., Hepps*, 475 U.S. at 776-78; *Gertz*, 418 U.S. at 341.

[27] *E.g., New York Times Co. v. United States*, 403 U.S. at 714; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (and cases cited therein); *see Near v. Minnesota*, 283 U.S. at 715-17.

- Those empowered to restrain speech must do so only under narrowly drawn standards to avoid arbitrary and discriminatory content-based action.[28]
- Courts must independently review judgments that threaten protected speech.[29]

These are all essentially due process considerations, focused on "the method by which [burdens on speech] are imposed. . . ." *See Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor, J., concurring). In most cases, they are subsumed under the First Amendment analysis, but they remain due process concerns nonetheless,[30] and when applied to the award of punitive damages in libel cases, they closely parallel the concerns expressed by members of the Court in *Browning-Ferris* and other recent cases.

B. The Award of Punitive Damages Fails to Satisfy Even Minimum Standards of Due Process.

The precise limits that should apply under the Due Process Clause to any award of punitive damages are fully discussed in the briefs of the parties and other amici. For purposes of this discussion, it is enough to simply note what members of the Court have said in recent opinions addressing the issue.

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), Justice

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[28] *E.g., Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (and cases cited therein); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969).

[29] *E.g., Harte Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2680-81 (1989); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-16 & n.50 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964).

[30] *See e.g., Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Freedman v. Maryland*, 380 U.S. 51 (1965).

Blackmun, writing for the Court, acknowledged existing authority for the view "that the Due Process Clause places outer limits on the size of a civil damage award made pursuant to a statutory scheme," but deferred consideration of the question of "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit," because the issue had not been adequately raised in the lower courts. *Id.*

Justice Brennan, joined by Justice Marshall, addressed the majority's recognition of due process limitations on *statutory* penalties by noting that the guidance given juries in determining punitive damage awards "is scarcely better than no guidance at all," and admonishing the Court to:

> look longer and harder at an award of punitive damages based on such skeletal guidance than [it] would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.

Id. at 2923 (Brennan, J., concurring).

Justice O'Connor, joined by Justice Stevens, voiced concern over "skyrocketing" punitive damages awards unlimited by any set of objective standards, and cited her earlier position in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 89 (1988), in which she, joined by Justice Scalia, observed that "[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor, J., concurring in part and dissenting in part).

As previously noted, these same due process concerns, heightened by their First Amendment setting, led four members of the Court in *Dun & Bradstreet* to dissent from the award of punitive damages, even in the context of purely private speech. Justice Brennan, joined by three

other dissenters, also noted that the objections to punitive damages are not confined to First Amendment cases. *See Dun & Bradstreet*, 472 U.S. at 780 n.4. *See also Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

More recently, in *The Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2607 n.5 (1989), Justice White, joined by Justice O'Connor and the Chief Justice, expressed concern about the constitutionality of punitive damages in a non-libel (but First Amendment) context:

> The Court does not address the distinct constitutional questions raised by the award of punitive damages in this case. . . . That award is more troublesome than the compensatory award discussed above.

(White, J., dissenting) (citations omitted).

From these various opinions, it appears that most members of the Court recognize the need for some constraints on the imposition of punitive damages in civil cases and, at a minimum, that these may include some form of objective standards to guide and limit the discretion of jurors in deciding whether to award punitive damages, and in what amounts.

The participants in this brief urge the Court to consider also whether *any* standards, procedural or otherwise, will adequately address the heightened need for due process protection where speech is the subject of such punitive measures. The unfortunate experience in libel cases has been that mere words, rules, and standards, no matter how carefully defined, are not enough to deter jurors and judges alike from exercising the power to punish unpopular speech and speakers with staggering punitive awards. It may well be that punitive damages are inherently "too blunt a regulatory instrument to satisfy . . . First Amendment principle[s]. . . ." *Dun & Bradstreet*, 472 U.S. at 778 (Brennan, J., dissenting).

C. The Award of Punitive Damages in Libel Cases Fails to Satisfy Heightened Due Process Standards Required by the First Amendment.

The danger punitive damages pose to protected speech was thoroughly explored in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The condemnation of such damages in that case would be enough, standing alone, to declare unconstitutional any punitive award in a libel case involving matters of public interest, were it not for the Court's qualifying language, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349.

This language has been interpreted by some lower courts as a ruling that punitive damages flow automatically where *New York Times* actual malice can be shown.[31] But the Court in *Gertz* did not discuss the relationship, if any, between a finding of actual malice and the award of punitive damages. The issue was left open and the holding simply confined to "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times*." 418 U.S. at 350. In fact, as noted above,[32] the requirement of "actual malice" in libel cases does not even address the questions of malice or evil motive in the common meaning normally required to support a punitive damage award. *See Harte Hanks Communications v. Connoughton*, 109 S. Ct. at 2685. Even minimal due process would require a more rational connection between such

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[31] *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983). Other courts have been less hasty to assume this conclusion, but have continued to uphold punitive awards, in some cases *because* of their uncertainty. *See Maheu v. Hughes Tool Co.*, 569 F.2d 459, 478 (9th Cir. 1977); *Buckley v. Littell*, 539 F.2d 882, 897 (2d Cir. 1976); *Davis v. Schuchat*, 510 F.2d 731, 737 (D.C. Cir. 1975).

[32] *See* notes 20-21 and accompanying text, *supra*.

punishment and the purpose it supposedly serves. In libel cases, that connection may not exist at all.

According to the Court in *Gertz*, the legitimate state interest underlying the law of libel "extends no further than compensation for actual injury," 418 U.S. at 348-49, and "punitive damages are wholly irrelevant to th[at] state interest," *id.* at 350. Therefore, the justification for punitive damages in such libel cases must be assessed on its own merits; it does not flow automatically from the rationale for compensatory damages.

For First Amendment purposes, punitive damages must be viewed independently, as a form of government action that seeks to punish and to deter speech. As such, they must be subjected to the same careful scrutiny and heightened due process considerations that would be required of any statutory scheme that attempted to accomplish the same ends. *See New York Times Co. v. Sullivan*, 376 U.S. at 277 ("What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."). Viewed in this perspective, it is clear that the award of punitive damages in libel cases, at least those involving matters of public interest, fails utterly to satisfy the heightened due process mandated by the First Amendment.

First, the declared purpose to deter future speech is fundamentally at odds with the purposes of the First Amendment to encourage free and open debate and to prevent self-censorship. *See Gertz*, 418 U.S. at 350; *See also Near v. Minnesota*, 283 U.S. 697, 713-20 (1931).

Second, punitive damages are awarded without narrowly-drawn standards and by juries who are given broad discretion to punish unpopular speech and speakers. Even if theoretical standards could be imposed, the process remains one of punishment based on the content of speech.

Third, the award of punitive damages, even in concept, fails to provide the "breathing space" required in

discussion of public affairs. Even under the most careful standards, it is impossible to ensure that the future speech intended to be deterred will be only speech that is unprotected by the First Amendment. Such broad-based restraints in a statutory scheme would be clearly unconstitutional. *See Freedman v. Maryland*, 380 U.S. 51 (1965).

In short, although it may be theoretically possible to formulate standards and procedures that would ensure punishment of only unprotected speech, the constitutional defects in the whole concept of punitive damages cannot be addressed simply by careful drafting. The intent to restrain future speech and the inherent discretion granted to juries under any such standards are fundamentally at odds with the First Amendment.

D. Standardless and Deferential Appellate Review of Punitive Damage Awards Cannot Satisfy Constitutional Requirements.

Despite the long-standing requirement of independent appellate review to protect against any judgment that threatens First Amendment rights, *see, e.g., New York Times Co.*, 376 U.S. at 284-86; *Bose*, 466 U.S. at 498-511, all too often appellate courts have refused to disturb judgments of punitive damages in libel cases unless "monstrously excessive" or so large as to "shock the judicial conscience."[33] In the First Amendment context, such elusive standards of review afford too little protection against abuse and are inconsistent with appellate courts' duty to "'independently decide whether the evidence in the record is sufficient to cross the constitu-

[33] *See Gertz*, 418 U.S. at 350; *Brown & Williamson v. Jacobson*, 827 F.2d at 1141 (multi-million dollar punitive damage award upheld because jury was not "mere putty in the hands of the plaintiff"); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1143-44 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986); *Braun v. Flynt*, 726 F.2d 245, 257 (5th Cir.), *cert. denied*, 469 U.S. 883 (1984).

tional threshold'" marked by the First Amendment. *Harte Hanks Communications v. Connaughton*, 109 S. Ct. at 2695 (quoting *Bose*, 466 U.S. at 511).

The Court in *Bose* explained that a jury's application of First Amendment principles:

> is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks . . .' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.

466 U.S. at 510 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) and *New York Times Co.*, 376 U.S. at 270). The threat of unrestrained damages equally jeopardizes First Amendment interests, *Dun & Bradstreet*, 472 U.S. at 770 (White, J., concurring), and the appellate court's duty under *Bose* to protect against the entry of any judgment that encroaches upon protected speech logically extends to judgments of punitive damages as well. *See Bose*, 466 U.S. at 511.

Whether the conduct at issue warrants the imposition of enormous civil fines meant to deter speech in the future is a determination that cannot be reviewed solely for whether a jury acted out of "passion and prejudice," or whether the amount is "excessive," or even whether it bears some "rational relationship" to harm caused in the past. The First Amendment requires far more precise limits. So long as juries retain discretion to punish and deter speech, even appellate courts cannot effectively protect against unconstitutional excess in the award of damages.

CONCLUSION

The harm caused by punitive damage awards—the threat to First Amendment and other societal values, the encouragement of unnecessary litigation, and above all, harm to the integrity of fundamental concepts of due process—when weighted against the theoretical justifications offered in the defense of such awards, leads to the conclusion that punitive damages are a remedy that society cannot afford and the Constitution does not permit.

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APPENDIX

APPENDIX

Identity of Individual Amici

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

Capital Cities/ABC, Inc., through its subsidiaries, owns national radio and television networks, television and radio stations, daily and weekly newspapers, and other publications, all of which are engaged in the gathering and dissemination of news to the public.

Dow Jones & Company, Inc. publishes, inter alia, *The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly*, the *Dow Jones News Services* and, through its Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states.

The Hearst Corporation is a diversified privately held communications company. It publishes numerous nationally distributed consumer magazines, daily and non-daily newspapers, business publications and hard-cover and soft-cover books. It also owns and operates a leading features syndicate and several television and radio broadcast stations.

Knight-Ridder, Inc., is an international information and communications company engaged in newspaper publishing, business and news and information services, electronic retrieval services, news, graphics and photo services, cable television, and newsprint production. The Miami-based company publishes 29 daily newspapers. Its various information services reach more than 100 million people in 129 countries.

National Broadcasting Company, Inc., itself and its subsidiaries, own and operate a national television network and television stations, all of which are engaged in the gathering and dissemination of news to the public.

Reuters Information Services Inc. is the primary North American operating company of Reuters Holdings PLC, the international news and financial information organization. Reuters supplies information to both business subscribers and to the news media. It obtains its information from approximately 160 exchanges and over-the-counter markets, from data contributed directly by more than 3,715 subscribers in 82 countries and from a network of some 1,270 journalists and photographers.

The Time Inc. Magazine Company is the largest publisher of general circulation magazines in the United States. It publishes *Time, Fortune, Sports Illustrated, People, Money, and Life.*

Tribune Company is a communications company owning *The Chicago Tribune, The New York Daily News,* the *Orlando Sentinel,* the *Fort Lauderdale News and Sun-Sentinel,* the *Escondido (CA) Times-Advocate,* the *Palo Alto Times-Tribune,* the *Newport News, Virginia Daily Press,* and *The Times Herald,* and television stations in Chicago, New York, Los Angeles, Denver, Atlanta and New Orleans.

United Press International, Inc. generates and compiles news and information reports and produces photographs on a worldwide basis, all of which are transmitted for sale primarily to media industry subscribers such as newspapers and radio and television broadcasters. It maintains 200 offices and bureaus in 90 countries, staffed by 1,500 full-time employees and 4,000 contributing correspondents.

The Washington Post is a newspaper published in the Washington, D.C. area with a daily circulation of 773,000 and a Sunday circulation of 1,126,000.

Westinghouse Broadcasting Company, Inc. through its subsidiaries owns and operates five network affiliated television stations and 20 radio stations, including four all-news radio stations. It is also a producer and distributor of broadcast and cable programming.

The American Society of Newspaper Editors is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include ongoing efforts to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, text books and educational materials. Its more than 200 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers including university presses and scholarly associations.

Magazine Publishers of America, Inc. is a national trade association including in its present membership 218 domestic magazine publishers who publish 756 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The National Association of Broadcasters, organized in 1922, is a nonprofit incorporated trade association which serves and represents America's radio and television stations and all the major networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

Radio-Television News Directors Association is a professional association of electronic journalists. The As-

sociation has more than 2,500 members who gather, edit and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent Supreme Court case involving the First Amendment rights of reporters to gather and disseminate news and information. It has provided representation, information, legal guidance, or research in virtually every major press freedom case litigated since 1970.

The Society of Professional Journalists is a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.